

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 09-094601

Employee: David Brading

Employer: Lincoln Industrial (Settled)

Insurer: Zurich American Insurance Co. (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 20, 2012. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued September 20, 2012, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 2nd day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	David Brading	Injury No.: 09-094601
Dependents:	N/A	Before the
Employer:	Lincoln Industrial (Settled)	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and
		Industrial Relations
		Of Missouri
Insurer:	Zurich American Insurance Co.	Jefferson City, Missouri
Hearing Date:	September 14, 2012	Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: November 7, 2009
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant was using a pry bar to flip a hopper when the bar slipped and hit his shoulder.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left Shoulder
14. Nature and extent of any permanent disability: 27.5% of the left shoulder
15. Compensation paid to-date for temporary disability: \$1,195.80
16. Value necessary medical aid paid to date by employer/insurer? \$34,693.33

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$642.91
- 19. Weekly compensation rate: \$428.61 / \$422.97
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Employer previously settled.

- 22. Second Injury Fund liability: Yes

35.975 weeks of permanent partial disability from Second Injury Fund \$ 15,216.35

TOTAL:

- 23. Future requirements awarded: None.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 % of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	David Brading	Injury No.: 09-094601
Dependents:	N/A	Before the
Employer:	Lincoln Industrial (Settled)	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Zurich American Insurance Co.	Jefferson City, Missouri
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PRELIMINARIES

The parties appeared before the undersigned administrative law judge on September 14, 2012 for a final hearing to determine the liability of the Second Injury Fund in the matter of David Brading (“Claimant”). Attorney Dean Christianson represented Claimant. Assistant Attorney General Tim Maurer represented the Second Injury Fund. The Employer, Lincoln Industrial, and its Insurer, previously settled with Claimant and did not participate in the hearing.

The parties stipulated to the following:

1. On or about November 7, 2009, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant. The accident occurred in Saint Louis County.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.; Venue is proper in the City of Saint Louis; Employer received proper notice of the claim; and Claimant filed the claim within the time allowed by law.
3. The average weekly wage at the date of injury was \$642.91, resulting in compensation rates of \$428.61 for temporary total disability (“TTD”), and \$422.97 for permanent partial disability (“PPD”).
4. Employer paid TTD of \$1,195.80, and medical expenses totaling \$34,693.33.
5. Claimant’s primary left shoulder injury resulted in 27.5% PPD of the shoulder. His preexisting permanent partial disabilities were 25% of the right knee, 15% of the left knee, 15% of the lumbar spine, and 25% of the cervical spine.
6. The simple sum of all disabilities is 287.8 weeks.

The issue to be determined is the liability of the Second Injury Fund, specifically whether the preexisting disabilities constituted a hindrance or obstacle to employment, and number represents the synergistic combination, if any, of the primary and preexisting disabilities?

SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Claimant offered Exhibits A to H, which were received into evidence without objection: The Second Injury Fund did not offer any additional exhibits.

Live Testimony

1. Claimant testified live. His testimony was credible.
2. On November 7, 2009, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant's left shoulder. Claimant was using a pry bar to flip a hopper when the bar slipped and hit his shoulder.
3. Claimant received authorized medical care, including conservative treatment with Dr. Kibby and surgical treatment with Dr. Nogalski.
4. Claimant and Employer settled the workers' compensation claim arising out of the accident for 27.5% PPD of the left shoulder.
5. Claimant has the following limitations or complaints regarding the work injury: weakness; pinching, pulling and pain sensations; limited reach and motion; the inability to use a weed eater, play with granddaughter, or throw.
6. Prior to the date of injury, Claimant had the following disabling injuries or conditions:
 - a. On June 20, 1990, Claimant sustained an injury when a steel door struck his right knee. Claimant received medical care, including injections and surgery. The injury resulted in 25% PPD of the right knee. Claimant has throbbing, weakness, pain and stiffness. The injury was disabling and constituted a hindrance and obstacle to employment.

- b. On or about May 30, 2003, Claimant saw Dr. Nogalski for left knee pain, and had surgery the following month. The injury resulted in 15% PPD of the left knee. Claimant has throbbing, weakness, pain and stiffness. The injury was disabling and constituted a hindrance and obstacle to employment.
- c. Beginning in 1999, Claimant sought treatment for chronic right-sided sciatica and lumbar spine pain. Claimant received medical care over the years from various doctors. He felt pulling, pain and cramping, and had to alter the way he performed various tasks like driving. The condition was disabling and constituted a hindrance and obstacle to employment.
- d. In late 2008, Claimant sought treatment for left neck and upper extremity pain. An MRI showed severe cervical stenosis. Dr. Coyle performed an anterior cervical discectomy and fusion in January 2009. Claimant had pulling with flexion and rotation and moved much more slowly following this surgery. The condition was disabling and constituted a hindrance and obstacle to employment.

Opinion Evidence

- 7. Dr. Volarich examined Claimant, took a history, and issued a report. He found Claimant sustained an accident arising out of and in the course of employment that resulted in injury to Claimant. He provided ratings of permanent partial disability for the primary left shoulder injury, and the right knee, left knee, lumbar spine and cervical spine in addition to other disabilities. He testified the combination of his disabilities creates a substantially greater disability than the simple sum, and a loading factor should be added.

FINDINGS OF FACT & RULINGS OF LAW

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the

last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004).

Claimant has met the burden imposed by law.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury that resulted in permanent partial disability equivalent to 27.5% of the left shoulder (63.8 weeks).
2. As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
 - a. 25% of the right knee (40 weeks).
 - b. 15% of the left knee (24 weeks).
 - c. 15% of the lumbar spine (60 weeks).
 - d. 25% of the cervical spine (100 weeks).

Total weeks for preexisting disabilities: 224

3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 12.5% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 63.8 weeks for last injury + 224 weeks for preexisting injuries = 287.8 weeks x 12.5% = 35.975 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$ 15,216.35 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Made by: _____
 KARLA OGRODNIK BORESI
 Administrative Law Judge
 Division of Workers' Compensation

Dated this _____ day of May 2013